No. 1341

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IN THE

Supreme Court of the United States

October Term, 1969

RAY H. PAGE, WARDEN
Petitioner

VERSUS

FRANK NACEO MARTIN
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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VERSUS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Ray H. Page, Warden, Oklahoma State Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on the 28th day of October, 1969. Notice of intention to petition for writ of certiorari was duly filed and an extension of time to file petition was granted.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Martin v. Page*, 417 F. 2d 309 (1969) and is attached hereto as Appendix "A." The opinion of the United States District Court for the Western District of Oklahoma appears as Appendix "B." In turn the opinion of the Court of Criminal Appeals of the State of Oklahoma appears as Appendix "C."

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 28, 1969. This petition for certiorari was filed within 90 days and the thirty days extension granted. This Court's jurisdiction is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

I

Under the provisions of 28 U.S.C. § 2254 (d) and (e), upon filing a petition for a writ of habeas corpus in a United States District Court, can a state prisoner meet his burden of proof by his own uncorroborated and unsupported testimony?

II

When years have lapsed since trial, the judge is deceased, the court appointed defense attorney is deceased, the law enforcement officers involved are deceased, cannot be identified, or have no recollection of the investiga-

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tion, and the court records deemed adequate at the time of trial now do not meet the requirements of subsequent judicial decisions, can a state prisoner meet his burden of proof under 28 U.S.C. § 2254 (d) and (e), in a petition for writ of habeas corpus in United States District Court by his own uncorroborated and unsupported testimony?

STATUTORY PROVISIONS INVOLVED

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

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(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record then the court shall determine under the

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existing facts and circumstances what weight shall be given to the State court's factual determination." (28 U.S.C. § 2254 (d) and (e))

STATEMENT OF THE CASE

This is a petition for a writ of certiorari by the State of Oklahoma through Warden Ray H. Page of the Oklahoma State Penitentiary praying for a review of the decision of the United States Court of Appeals Tenth Circuit handed down on October 28, 1969, affirming an order of the United States District Court for the Western District of Oklahoma that a writ of habeas corpus shall issue. The appellee remains in state custody serving a separate sentence during the appeal and this petition for a writ of certiorari.

STATEMENT OF THE FACTS

Frank Naceo Martin was arrested at approximately noon on Saturday January 12, 1952, by officers of the Oklahoma City Police Department, with two other males, as a result of a "gang rape" which took place in the early morning hours of that same date. A written statement was executed by Martin during mid-afternoon of January 12, 1952, concerning the incident. Thereafter on January 15, 1952, Martin executed a second written statement concerning a rape that had occurred on or about November 22, 1951, in the same area of Oklahoma City, Oklahoma.

On January 16, 1952, before a Justice of the Peace, a preliminary information was filed against Martin and two others alleging Rape in the First Degree of Margaret

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Lucille East in Justice of the Peace Court case no. 1045. He was arraigned thereon, plea of not guilty entered, and committed to the custody of the Sheriff of Oklahoma County, all on January 16, 1952. On January 24, 1952, Martin waived preliminary hearing and was bound over to the District Court for Oklahoma County, State of Oklahoma in that district court No. 20850. (Record on Appeal, petitioner's exhibits A-1 through A-5).

In Justice of the Peace Court case No. 1309, before Justice of the Peace Elmo McCallister, Oklahoma County, Oklahoma, a preliminary information was filed January 16, 1952, against Martin charging him with Rape in the First Degree of one Connie Luna on the 22nd day of November, 1951. On January 16, 1952, Martin was arraigned on this charge, a plea of not guilty entered, preliminary hearing waived, ordered committed to the custody of the Sheriff of Oklahoma County, and transcribed to District Court for Oklahoma County as District Court No. 20830. (Record on Appeal, petitioner's exhibits A-6 through A-10 and B-6).

Again in Justice of the Peace Court, case No. 1044, before Justice of the Peace Ben La Fon, Oklahoma County, Oklahoma, a preliminary information was filed on January 24, 1952, charging Martin and others with the crime of Robbery with Firearms. On the same date, January 24, 1952, Martin was arraigned, a plea of not guilty entered, preliminary hearing waived, Martin and the other defendants were transcribed to the District Court for Oklahoma County. This charge was transcribed to the District Court

under that court's number 20848. (Record on Appeal, petitioner's exhibits A-11 through A-15).

In addition, felony informations alleging Larceny of an Automobile and Burglary in the Second Degree were accordingly filed in District Court No's. 19539 and 20867. Since sentences imposed on those two charges have been served they are not before this court and details do not appear in the record on appeal. (Record on Appeal, petitioner's exhibit B-15 through B-18).

In Oklahoma County District Court No. 20830 by court order on January 18, 1952, Charles Moss, Public Defender, was appointed as defense counsel. (Record on Appeal, petitioner's exhibits B-7 and B-9). In that court's Nos. 20850 and 20848 the State District Court, by order, appointed the same public defender, Charles Moss, as defense counsel for Martin in those respective cases on January 25, 1952. (Record on Appeal, petitioner's exhibits B-3, B-5, B-12, B-14).

On February 6, 1952, Martin, accompanied by his attorney, appeared before the District Court, withdrew his plea of not guilty in case No. 20848, and was sentenced to a term of "Life" in the State Penitentiary. (Record on Appeal, petitioner's exhibit B-13 and B-14). In cases Nos. 20850 and 20830 Martin appeared before the same court on February 6, 1952, accompanied by counsel, withdrew his plea of not guilty, entered a plea of guilty and was sentenced to a term of "Life" in each case. The sentences to run concurrently with that imposed in case No. 20848.

(Record on Appeal, petitioner's exhibit B-4, B-5, B-8, and B-9). At the same time Martin entered pleas of guilty to Larceny of an Automobile (Case No. 19539) and Burglary in Second Degree (Case No. 20867). He was sentenced to three years in No. 19539 and to seven years in No. 20867, those sentences to run concurrently with the sentence imposed in case No. 20848. (Record on Appeal, petitioner's exhibits Nos. B-16 and B-18).

After serving nine years, eleven months, and twenty-eight days Martin was paroled from the Oklahoma State Penitentiary. (EH 23). On September 20, 1967, Martin was convicted of Manslaughter after trial by jury on a charge of murder and sentenced to a term of nine and one half years. This offense having occurred while Martin was at liberty on his parole. (EH 23-26 and 43).

On December 26, 1967, a petition for writ of habeas corpus was filed before the Court of Criminal Appeals of Oklahoma. (Record on Appeal, petitioner's exhibit E-1). After being denied by that court as set forth in *Martin v. Page*, Okl. Cr., 444 P. 2d 830, a petition for writ of habeas corpus was filed in the United States District Court for the Western District of Oklahoma.

In an evidentiary hearing held in the United States District Court for the Western District of Oklahoma Martin testified that during the early morning hours of the day following his original arrest he was beaten by police. Later that same morning, he declared he was promised "ten years" and thereafter "signed papers." (EH 14-16) In his

appearances before magistrates and finally the State District Court Martin stated he was given no advice by the judges as to his "constitutional rights" and that he plead guilty because of the promise of "ten years." (EH 27-28).

The prosecuting attorney, although unable to recall the details of the proceedings when Martin entered his plea of guilty, was able to testify as to the care of that particular district judge in all guilty pleas to see that all rights of the defendant were protected. (EH 59-60). He was able to testify as to the standard of legal representation afforded all defendants by Martin's court appointed attorney. (EH 59).

One of the investigating officers of the Oklahoma City Police Department, who took one statement from Martin, testified it was taken on the afternoon of the arrest, that it was freely and voluntarily given, that Martin was not physically or otherwise abused, and that Martin was given no promises. (EH 64-68).

The two statements signed by Martin were produced to show the circumstances under which they were given. (Record on Appeal, Defendant's exhibits No. 1 and No. 2).

Notice of appeal was timely filed and appeal pursued in the United States Court of Appeals for the Tenth Circuit. The decision of that appeal court appears in *Martin v. Page*, 417 F. 2d 309 (1969).

This matter now comes before the United States Supreme Court on petition of the State of Oklahoma for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Justice Clark, in 1963, in his dissenting opinion offered this observation:

> "In fact, the courts are already swamped with applications which cannot, because of sheer numbers, be given more than cursory attention." *Fay v. Noia*, 372 U.S. 391, 446; 9 L.Ed. 2d 837, 873; 83 S.Ct. 822.

Footnote two thereof reflects that in 1962 a total of 1,232 such petitions were presented to federal courts by state prisoners.

The Annual Report of the Director, Administrative Office of the United States Courts reflects the number of such petitions by state prisoners in 1969 as 9,312. Justice Clark's statement in the same case, *Fay*, supra, at page 45, now appears prophetic:

> "While it may be that the Court's 'decision today swings open no prison gates,' the Court must admit in all candor that it effectively swings closed the doors of justice in the face of the State, since it certainly cannot prove its case 20 years after the fact."

The validity of Justice Clark's concern in 1963 is given added emphasis by the increase in volume of cases in this category coming before the federal courts six years later. The case at bar and those heard in the past four years have been under the provisions of 28 U.S.C., § 2254, as amended in 1966. Within that statute, under subsection (d), appears the burden of proof upon the petitioner when the record of the state court proceedings, considered as a whole, fairly supports the state court's decision. It is defined as:

> ". . . the burden shall rest upon the applicant to establish by *convincing evidence* that the factual determination by the State court was erroneous." *Justus v. State of N.M.*, 378 F. 2d 344, cert. den. 390 U.S. 1016, 20 L.Ed. 2d 166, 88 S.Ct. 1268. (Emphasis added)

Subsection (e) of 28 U.S.C. 2254 contains no definition of the burden of proof on the petitioner "if the State cannot provide such pertinent part of the record . . . ." It has been necessary for the courts to determine that burden. A petition for a writ of habeas corpus in federal court has been held a civil proceeding, *Holman v. Lawhon*, 362 F. 2d 1 (5th Cir. 1966); that the petitioner must establish his entitlement to relief by a preponderance of the evidence, *Waddy v. Heer*, 383 F. 2d 789, cert. den. 392 U.S. 911, 88 S.Ct. 2069, 20 L.Ed. 2d 1369 (1967); *Walker v. Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830, 836 ( ); *Walker v. Beto*, 387 F. 2d 626 (5th Cir. 1967); *Hall v. Page*, 267 F. Supp. 520 (N.D. Okl. 1967); *Walker v. Bishop*, 295 F. Supp. 767 (E.D. Ark. 1967), affirmed 408 F. 2d 1378 (8th Cir. 1969). The well recognized definition applicable to other civil cases of long standing has therefore been applied. Noteworthy, and possibly critical, is the presence in "other civil cases" of the doctrine of "laches" and the principle of statute of limitations to preclude litigation after extended lapses of time—in effect accomplishing a doctrine of finality to these "other civil cases."

Any misapprehensions of the application of this doctrine of finality to petitions for writs of habeas corpus have been put to rest by this court:

"Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed. 2d 148, 156.

". . . conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 824, 9 L.Ed. 2d 837, 860.

"Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief." *Kaufman v. United States*, 22 L.Ed. 2d 227, 238.

Absent finality under subsection (e), a state prisoner can raise a question as to alleged denial of United States Constitutional Rights without limit as to time. The testimony of a state prisoner in a federal plenary hearing can only be met by evidence that must come from the judge, the prosecutor, the defense attorney, the court reporter, the court attendants, and the record of the original proceedings. Judges, attorneys, and court attendants suffer from vagueness of memory and death through the lapse of time. Court reporters' notes cannot be located or cannot be transcribed. The court records, deemed adequate when made, by change of judicial concept are regarded as inadequate. Here the judge, the defense attorney, and the investigating officers are dead, or can no longer be located. The memory of the prosecuting attorney only permits him

to recall the habitual standard of care of the trial judge in accepting pleas of guilty but does not permit him to recall this particular case. The court records consisting of the minutes of the court clerk and the judgment and sentence were regarded as adequate at the time of the trial in 1952. But they are now regarded as inadequate since no record for transcript was made of the entry of the plea and the imposition of judgment and sentence.

Herein the petitioner testified that he was "promised ten years." No other witness or evidence was produced to corroborate it. He testified he was "beaten" while in custody. Again no evidence was presented to corroborate it. He testified he was beaten until he confessed. Again no evidence of corroboration was presented. He testified he assaulted his attorney in the court room without corroboration. Yet the judge in the evidentiary hearing found as a fact that this petitioner was beaten, that he was promised a sentence of ten years and entered a plea of guilty pursuant to said alleged promise. That court's findings of law involved the application of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, retroactively despite *Johnson v. New Jersey*, 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772; that the absence of counsel at his preliminary hearings and alleged delay in arraignment, though not a critical stage in the proceedings, represented denial of United States Constitutional Rights; and that alleged confessions given but never used in trial were invalid and ordered vacated.

The lower appellate court herein, *Martin v. Page*, 417 F. 2d 309, points out that:

> ". . . the court below deemed Martin a completely credible witness in his own behalf." *Martin*, supra, at page 309

It continues with the opinion by stating at page 310:

> "Although the self-serving testimony of a felon is certainly suspect and should be viewed by the fact-finder with caution we know of no rule that extends further as a bar to the acceptance of such testimony as sustaining an evidentiary burden . . . *Appellee's testimony, of credible, is legally sufficient to support the granting of federal relief.*" (Emphasis added)

In treating with the "clearly erroneous" concept of Rule 52(a), Federal Rules Civil Procedure, the same court continues on the same page, supra:

> "However, appellee's credibility also finds support in the record. Appellee made no personal complaint concerning a beating he suffered from police officers while in custody, indicating a possible inference that, despite *inexcusable maltreatment*, he was content with his 'package deal.' And an even stronger inference that such a deal existed can be premised on the *undisputed fact* that appellee immediately after the pronouncement of life sentences turned on his appointed counsel and violently attacked him in open court. Such conduct is consistent with a subjective belief that a firm and inducive promise had been broken." (Emphasis added)

Upon Martin's own testimony the lower court finds there was "inexcusable maltreatment" but is silent on corroboration. Again it is found that Martin "turned on his appointed counsel and violently attacked him in open

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court," but is silent on corroboration. Instead, substantiation is found in what is declared "undisputed fact." There is no explanation or elaboration of why it is undisputed! The record is clear. Through the lapse of time the witnesses who could dispute it are dead.

Lengthy sentences are imposed on those convicted of heinous crimes or those with background justifying such pronouncement. It is in these types of cases that the problem under subsection (e) habitually arises. The probability that the witnesses will still be alive is greater when convictions with shorter sentences are contested in United States district courts through petitions for writs of habeas corpus. It is in the lengthy sentences, as here, that the probability is greatest that the convicted state prisoner will testify in a hearing under 28 U.S.C. 2254(e) without danger of his testimony being disputed. Those who can dispute it will be dead. The case at bar becomes classic. The original petitioner, Martin, received the minimum sentence, life, under the pertinent state statutes, then was paroled after serving a minimum period of some ten years only to commit a homicide and again be convicted. Then and only then did he begin to question his original conviction and then after all necessary witnesses were dead or unavailable.

The lower appeal court under this set of circumstances finds no bar "to the acceptance of such testimony as sustaining an evidentiary burden"; that Martin's "testimony, if credible, is legally sufficient to support the granting

of federal relief." The credibility of this original petitioner is found to have support in the record. This record is his *own testimony.* It is his own testimony alone that states he kept silent after the claimed beating and the lower court finds this lends credibility to his claim of a "package deal." Again it is found that support is present for his testimony by his own testimony that he turned on his own counsel and violently attacked him. This is described as "undisputed" without reference to the demise of those witnesses who could "dispute" his claim of assault on his dead counsel.

Is the result of this decision that state prison inmates, convicted of heinous crimes and given lengthy sentences, after parole upon one or more times, can wait until the witnesses necessary to dispute their testimony are dead and then obtain their release upon their own testimony from one single U.S. District Judge exercising his judicial discretion in a hearing under 28 U.S.C. 2254(e)? The lower court herein has answered in the affirmative!

CONCLUSION

The petitioner before this court, the State of Oklahoma through its warden Ray H. Page, contends this result is *shockingly wrong,* that it portends results to the public at large that amply justified granting of certiorari in this case and reversal of the lower court's decision with proper instructions that an inmate of a state institution cannot wait years after his original conviction and then meet his

burden of proof by his own unsupported and uncorroborated testimony. For that reason it is urged that certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX "A"

Frank Naceo MARTIN, Petitioner-Appellee
v.
Ray H. PAGE, Warden, Respondent-Appellant

No. 217-69

United States Court of Appeals
Tenth Circuit
Oct. 28, 1969

Habeas corpus proceeding by state prisoner. The United States District Court for the Western District of Oklahoma, Luther Bohanon, J., granted relief, and appeal was taken. The Court of Appeals held that state prisoner's testimony, including statement that he entered guilty pleas with firm conviction that he would receive a sentence of ten years on all charges, if credible, was legally sufficient to support granting of federal habeas corpus relief.

Affirmed.

Habeas Corpus 85.5(5)

State prisoner's testimony, including statement that he entered guilty pleas with firm conviction that he would receive a sentence of ten years on all charges, if credible, was legally sufficient to support granting of federal habeas corpus relief.

H. L. McConnell, Asst. Atty. Gen., (G. T. Blankenship, Atty. Gen., and Dale F. Crowder, Asst. Atty. Gen., on the brief), for appellant.

Don Hamilton, of Hamilton & Carson, Oklahoma City, Okl., for appellee.

Before MURRAH, Chief Judge, LEWIS, Circuit Judge, and THEIS, District Judge.

PER CURIAM.

This is an appeal from a judgment and order of the United States District Court for the Western District of Oklahoma granting relief to appellee Martin by writ of habeas corpus. Martin is a state prisoner presently in the custody of appellant by virtue of the imposition of three sentences which are the subject of the case at bar and at least one additional sentence the validity of which is not now questioned. Each of the questioned sentences was imposed after entry of a plea of guilty and the relief granted by the district court was premised on findings that such pleas were not entered "voluntarily, knowingly and understandingly, but [Martin] entered said pleas with the firm conviction that he would receive a sentence of ten (10) years on all of these charges."

The issue of the voluntariness of Martin's pleas had earlier been considered by the Oklahoma Court of Criminal Appeals in a post-conviction proceeding. That court, after a full evidentiary hearing, rejected Martin's claims and denied relief. Martin v. Page, 444 P. 2d 830. However, the federal district court was unable to accord weight to the presumptive correctness of the state court decision, 28 U.S.C. § 2254(d), because the State of Oklahoma had not recorded the testimony given at the state hearing. This unfortunate and avoidable frustration of the cited statute required the district court to hold an independent evidentiary hearing and to make original findings of fact premised largely on a subjective determination of credibility. From our examination of the federal record and our reading of the state court opinion it seems apparent that the state court rejected the credibility of Martin's own testimony and the court below deemed Martin a completely credible witness in his own behalf. Since we are reviewing only the federal evidentiary record we accept the determination of credibility made by the district court.

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Appellant concedes, as he must, that appellee is entitled to federal relief if, in truth, the subject pleas of guilty were motivated by a promise of a ten-year sentence.[1] But appellant argues, at least inferentially, that appellee cannot meet his burden of establishing the involuntariness of his pleas by his self-serving testimony and contends directly that Martin's testimony is wholly uncorroborated in the case at bar by circumstance or otherwise. We must reject each argument.

Although the self-serving testimony of a felon is certainly suspect and should be viewed by the fact-finder with caution we know of no rule that extends further as a bar to the acceptance of such testimony as sustaining an evidentiary burden. Here, appellee testified that soon after his arrest and while incarcerated he was interviewed by Oklahoma police officers, urged to clean up the three subject crimes and told: "Well, you understand you can do ten years and come back and everything will be all right, you know, you want to get it all out of the way." Thereafter, appellee testified, he believed he had a "package deal" and accepted all procedures and authoritative suggestions without complaint until sentences were imposed. Appellee's testimony, if credible, is legally sufficient to support the granting of federal relief.

Appellant, however, further contends that the credibility of appellee's testimony is overwhelmed by both direct testimony and the totality of circumstances shown by the record and that the finding below is thus clearly erroneous within the appellate purview of Rule 52(a), Fed. R. Civ. P. We certainly agree that the record does disclose circumstances and events, some of which are

1. We do not deem it necessary to consider whether any other proper premise for federal relief is reflected in the record.

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discussed in the cited opinion of the state court, that might well convince a fact-finder that appellee's pleas were voluntary. However, appellee's credibility also finds support in the record. Appellee made no personal complaint concerning a beating he suffered from police officers while in custody, indicating a possible inference that, despite inexcusable maltreatment, he was content with his "package deal." And an even stronger inference that such a deal existed can be premised on the undisputed fact that appellee immediately after the pronouncement of life sentences turned on his appointed counsel and violently attacked him in open court. Such conduct is consistent with a subjective believe that a firm and inducive promise had been broken. The trial court, having so found, is supported by the record and the judgment is

Affirmed.

Joe HEGWOOD, Appellant

v.

Harold R. SWENSON, Warden, Appellee

No. 19634

United States Court of Appeals
Eighth Circuit
Oct. 30, 1969

Petition for federal habeas corpus by state-held prisoner. The United States District Court for the Western District of Missouri, Elmo B. Hunter, J., denied petition, and prisoner appealed. The Court of Appeals held that since it appeared that, under amended Missouri rule, state prisoner could present state sentencing court, on motion to vacate judgment and sentence, with all contentions and issues raised in federal court on petition for federal habeas corpus (which contentions, among other things, raised issue of state's failure to furnish him

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counsel at evidentiary hearing on previous motion to vacate sentence and on appeal therefrom), prisoner had not exhausted his state court remedies and order overruling his federal petition was properly denied.

Affirmed.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Frank Naceo MARTIN, Petitioner

v.

Ray H. PAGE, Warden of the Oklahoma State Penitentiary, McAlester, Oklahoma, Respondent

No. CIV-68-313

ORDER

This matter came on for consideration by the Court on December 18. 1968, upon the Petition for Writ of Habeas Corpus filed herein by the petitioner, Frank Naceo Martin, and after hearing the evidence and the testimony of the witnesses, and otherwise being fully advised in the premises, made Findings of Fact and Conclusions of Law, which were filed in this cause on the 27th day of December, 1968, and based upon the Findings of Fact and Conclusions of Law so filed as aforesaid, it is the

ORDER AND JUDGMENT OF THE COURT that the confessions of the petitioner referred to in the Findings of Fact and the judgment and sentence of the District Court of Oklahoma County, Oklahoma, entered on the 6th day of February, 1952, in each of the following cases, to-wit: No. 20848, robbery with firearms; No. 20830, rape in the first degree; and No. 20850, rape in the first degree are hereby vacated and set aside, without prejudice to the State of Oklahoma to take such proper and legal action or actions as it may deem appropriate.

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IT IS THE FURTHER ORDER AND JUDGMENT OF THE COURT that the respondent herein, Ray H. Page, Warden of the Oklahoma State Penitentiary, McAlester, Oklahoma, release and discharge the petitioner, Frank Naceo Martin, from further serving the sentences in the cases hereinabove mentioned, imposed by the District Court of Oklahoma County.

Dated this 27th day of December, 1968.

/s/ Luther Bohanon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Frank Naceo MARTIN, Petitioner
v.
Ray H. PAGE, Warden of the Oklahoma State Penitentiary, McAlester, Oklahoma, Respondent

No. CIV-68-313

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. In this case the petitioner, Frank Naceo Martin, filed his Petition for Writ of Habeas Corpus naming Ray H. Page, Warden of the Oklahoma State Penitentiary, as respondent.

2. Petitioner upon a plea of guilty was sentenced by the District Court of Oklahoma County, Oklahoma, on the 6th day of February, 1952, to serve three life sentences, one for robbery with firearms and two for rape in the first degree, all sentences to run concurrently.

3. Petitioner alleges that he is being unlaw-

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fully restrained by the respondent under these sentences and that said sentences are illegal, unlawful, unconstitutional and in violation of petitioner's substantial and constitutional rights, both of the State of Oklahoma and of the United States of America in the following particulars, to-wit:

(a) That when arraigned before the justices of the peace of Oklahoma County, no inquiry as to his ability to provide himself with counsel was made, nor was inquiry made of the defendant if he was financially able to employ counsel, and without providing him with counsel at such preliminary hearings.

(b) That while being held in the county jail awaiting hearing on the charges, he was severely beaten by Oklahoma City authorities and purported confessions were taken from him thereafter. He alleges further that said confessions were obtained by use of force and violence.

(c) Petitioner alleges that after he was bound over after his preliminary hearings to the District Court of Oklahoma County, he was advised by police officers that if he would clear up some matters, he would receive a sentence of ten (10) years.

(d) The public defender of Oklahoma County, who is now deceased, was appointed to represent petitioner. Petitioner alleges that his court-appointed counsel came to his jail cell in the Oklahoma County jail on one occasion for a few minutes and advised him that he had been appointed to enter his plea of guilty, and the only other time he saw said counsel was on the day when sentence was actually imposed.

(e) Petitioner says that contrary to his understanding that he would receive a term of ten (10) years only, that he was sentenced to these three life terms to run concurrently, and he entered his plea

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to said charges when he was not adequately represented and when he was totally unadvised of his constitutional rights and privileges with respect to the matters with which he was charged.

(f) Petitioner alleges that the sentencing court failed and neglected to advise him of his right to appeal said judgments; failed to advise petitioner that if he was unable to provide for the necessary expenses in preparing his appeal the State would provide him with counsel and the record for such appeal; that he was not advised of his right to a trial by jury; was not advised of the penalties provided by law for the charges.

(g) Petitioner alleges that he has exhausted all his State remedies and that, therefore, this Court has jurisdiction to hear and determine his Petition for Writ of Habeas Corpus.

4. Ray H. Page, the respondent, filed his Response, pursuant to order of this Court, on November 7, 1968, wherein respondent says that petitioner filed a Petition for Writ of Habeas Corpus in the Oklahoma Court of Criminal Appeals and on July 17, 1968, the same was denied by that Court in *Martin v. Page*, Okl. Cr., 444 P. 2d 830. The Court of Appeals in opinion handed down in this case had the following contentions to determine: (1) That he (Petitioner) was beaten by the Oklahoma City police officers and confessions were obtained from him, (2) that he was advised by unnamed officers that if he entered pleas of guilty * * * he would receive a sentence of ten years * * *, (3) that he was arraigned in the justice of the peace court and waived preliminary hearing all without assistance of counsel and without being advised of his rights to such assistance, and (4) that he was not advised of

his right to appeal and was ignorant of such right.

5. Further in his Response the respondent states that at a hearing before the Court of Criminal Appeals on January 16, 1968, petitioner was present by his attorneys and was sworn and testified. The Court of Appeals in its opinion, supra, held that the petitioner's contention that he had been beaten by the police officers was supported by the evidence, but that the officer who abused the petitioner was not seeking a confession but that he beat petitioner because one of the victims of the rape was a friend of the officer's and that such a confession was not used, as there was no trial; that the petitioner knowingly and intelligently entered pleas of guilty and did so with full knowledge of the nature and consequences of such pleas while represented by competent counsel and that he made no attempt to withdraw his pleas after sentences were imposed; that petitioner effectively waived any irregularities in the preliminary hearings by his voluntary plea of guilty and that the record reflected that the trial judge did, in fact, advise the petitioner of his right to appeal.

6. Respondent contends that the use of force is immaterial in obtaining the alleged confession unless it is alleged that such confession was later used in evidence against petitioner, and such confession was not used because there was no trial; and that the Court should accept the State Appellate Court's Finding that the petitioner knowingly and intelligently entered pleas of guilty with full knowledge and nature of the consequences of such pleas, and great weight should be attached to the fact that petitioner was represented by counsel at the time he entered his pleas; and further that it is immaterial that petitioner waived preliminary hearing, without assistance of

counsel, since his later voluntary plea of guilty waives all jurisdictional defects in the preliminary hearings prior thereto.

7. This Court ordered and granted an evidentiary hearing in this case, and the case came on for hearing before the Court on Thursday, December 18, 1968, the petitioner was present in person and was represented by his counsel, Hamilton & Carson, through Mr. Don Hamilton, and the respondent was represented by Mr. W. Howard O'Bryan, Assistant Attorney General of the State of Oklahoma, and thereupon petitioner presented his evidence and rested, and the respondent presented its evidence and rested.

8. Prior to the hearing in this Court on December 18, 1968, this Court requested of the Attorney General of the State of Oklahoma, counsel for respondent, that a transcript of the proceedings or the testimony had before the Court of Criminal Appeals of the State of Oklahoma upon petitioner's Writ of Habeas Corpus be furnished for consideration, in order that this Court could determine what evidence and matters were presented to the Court of Criminal Appeals. This request was made to determine exactly what was before the Court of Criminal Appeals in order to determine whether the constitutional questions involved were presented to the Court of Criminal Appeals, and if the evidence was sufficient to sustain the conclusions reached by the Court of Criminal Appeals in the case of *Martin v. Page*, supra. By letter dated December 6, 1968, addressed to this Court and from the Attorney General of the State of Oklahoma in re: Frank Naceo Martin, Petitioner, v. Ray H. Page, Warden, Respondent, No. 68-313-Civil, this Court was advised as follows:

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"The Court of Criminal Appeals of Oklahoma did hold an evidentiary hearing in the above styled case on Jan. 16, 1968. No record was made of the testimony in this proceeding since the Court has no appropriated funds with which to pay a court reporter.

I trust this information is sufficient."

Consequently, this Court is without the benefit of the testimony presented to the Court of Criminal Appeals.

9. The Court finds as a matter of fact that while petitioner was in custody by the City police, petitioner was beaten, and the evidence shows that one confession was taken from petitioner before the alleged beating, and one was taken thereafter. To be specific, the confessions, introduced in evidence in this case shows that the first confession, defendant's Exhibit 1, was taken by the police January 12, 1952, at approximately 3:00 p.m.; and the second alleged confession was taken by the police on the 15th of January, 1952, at approximately 11:30 a.m. The opening typed paragraph of Exhibit 1 states:

"I, Frank Naceo Martin, make the following statement of my own free will and accord without any threat or promise having been made on the part of anyone concerned, after first having been advised that what I say may be used as evidence in the event of prosecution."

and in the second confession, Exhibit 2, typed paragraph No. 2 it is stated:

"I, FRANK NACEO MARTIN, make this free and voluntary statement to E. E. Jones, Walter Gates, Wayne Harbolt, and Beth Ward in the Detective Bureau of the Oklahoma City Police Department this 15th day of January (1952) at approximately 11:30 a.m."

Neither of the above alleged confessions show that the petitioner here was advised of his legal right to counsel before making any such statement, nor was he advised of his right to remain silent.

10. The evidence before this Court shows that petitioner was advised at the time one or both of said confessions was taken, that if he cleared up these matters he would receive a sentence of ten (10) years imprisonment and that the petitioner relied upon such promise.

11. The evidence shows and the Court finds that when he was arraigned before the respective justices of the peace of the charges under consideration here and that at his preliminary hearing he was not advised of his right to counsel and did not knowingly and voluntarily waive preliminary hearing.

12. The Court finds that the petitioner did, in fact, either personally or through his court-appointed counsel, enter pleas of guilty to the charges but that he did not enter such pleas of guilty voluntarily, knowingly and understandingly, but entered said pleas with the firm conviction that he would receive a sentence of ten (10) years on all of these charges.

13. The Court further finds from the evidence before the Court that petitioner was not advised of his right to a trial by jury on the charges against him; petitioner was not advised of the possible sentences which could be imposed by the Court under a plea of guilty, and that petitioner, therefore, did not freely and voluntarily enter such pleas of guilty with full knowledge of the nature and consequences of such pleas.

14. The Court further finds that under all the circumstances presented by the evidence in this case that by entering his alleged plea of guilty before

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the District Court of Oklahoma County, Oklahoma, he did not thereby waive the failure of the justices of the peace at preliminary hearings to advise the petitioner of his rights, and to furnish him with counsel.

15. The Court has examined the judgment and sentence in each of these cases as shown by the files and records of the Clerk of the District Court of Oklahoma County, Oklahoma, in evidence here, and these documents do not show that plaintiff's rights as above enumerated were explained to him and do not show that he voluntarily, knowingly and understandingly entered his pleas of guilty, with full knowledge of the consequences thereof.

16. The evidence in the case shows and the Court finds that petitioner acknowledged his guilt before the Pardon and Parole Board prior to receiving a parole from that Board. Indeed, before this Court the petitioner, while under no duress whatsoever, did voluntarily advise this Court that he did, in fact, rape Margaret Lucille East as charged in the Information filed by the State of Oklahoma in case No. 20850, but denied his guilt of the other offenses charged in the other cases.

17. The evidence shows and the Court finds that petitioner was not taken before a magistrate without unnecessary delay; the evidence shows that petitioner was placed under arrest on January 12, 1952, and although an alleged confession was taken from him on that date, preliminary informations were not filed until January 16, 1952, and petitioner was not taken to nor did he appear before the committing magistrate until January 16, 1952. 22 O.S.A. 181, U.S. Const. Amends. 5, 6, 14; Okla. Const. Article 2 Sec. 7, 20.

CONCLUSIONS OF LAW

The Court concludes as a matter of law as follows:

1. The police department of the City of Oklahoma City violated petitioner's rights by not advising him of his right to remain silent, and not advising him of his right to have counsel advise him prior to the taking of the alleged confessions, defendant's Exhibits 1 and 2. *Miranda v. Arizona*, 384 U.S. 436, 494.

2. Petitioner's constitutional rights were violated by his not being advised at his preliminary hearings on the respective charges that he was entitled to right to counsel and further failure to advise him that if he was an indigent person, that counsel would be appointed for him, to advise him prior to entering any kind of a plea or waiving preliminary hearing.

3. Petitioner's constitutional rights were violated by the District Court of Oklahoma County, Oklahoma, in that said Court did not advise petitioner of his right to a trial by jury, of the consequences of a plea of guilty and failure of the Court to ascertain prior to acceptance of such pleas that the pleas were made voluntarily, knowingly and understandingly without any promise or duress.

4. That the sole question or questions before this Court is whether petitioner's constitutional and statutory rights were violated and not whether petitioner is, in fact, guilty of one or more of the crimes with which he was charged.

5. Where question of violation of accused's constitutional rights is presented, decision of highest State Court in habeas corpus proceeding, while entitled to great weight, does not bind proceeding in

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Federal Court. *Vasser v. Raines*, Warden (Okl.) 274 F. 2d 369 (10 C.A.)

6. The police department of the City of Oklahoma City by the holding of petitioner without cause from the 12th day of January, 1952, until January 16, 1952, violated his rights under both the United States and Oklahoma constitutions.

7. The Court concludes that the alleged confessions of Petitioner and the judgments and sentences in the three cases under consideration here are invalid and should be vacated.

Dated this 27th day of December, 1968.

/s/ Luther Bohanon
United States District Judge

APPENDIX "C"

Frank Naceo MARTIN, Petitioner
v.
Ray H. PAGE, Warden of the Oklahoma State Penintentiary, Respondent
Cr. No. A-14566

Court of Criminal Appeals of Oklahoma
July 17, 1968

Original habeas corpus proceeding. The Court of Criminal Appeals, Bussey, J., held that where defendant knowingly and intelligently entered pleas of guilty with full knowledge of nature and consequences of such pleas, while represented by counsel and advised of right to appeal, but neither sought to withdraw guilty pleas nor to perfect appeal, and where defendant thereafter fully and voluntarily acknowledged his guilt before Pardon and Parole

Board and was granted parole which was later revoked, he was not entitled to discharge from penitentiary by way of habeas corpus, even though there was evidence that he was beaten by city police officers while confined in city jail and that he was promised a ten year sentence in exchange for his guilty pleas by such police officers.

Writ denied.

Habeas Corpus 25.1(3)

Where defendant knowingly and intelligently entered pleas of guilty with full knowledge of nature and consequences of such pleas, while represented by counsel and advised of right to appeal, but neither sought to withdraw guilty pleas nor to perfect appeal, and where defendant thereafter fully and voluntarily acknowledged his guilt before Pardon and Parole Board and was granted parole which was later revoked, he was not entitled to discharge from pententiary by way of habeas corpus, even though there was evidence that he was beaten by city police officers while confined in city jail and that he was promised a ten-year sentence in exchange for his guilty pleas by such police officers.

SYLLABUS BY THE COURT

Where the defendant knowingly and intelligently entered pleas of guilty to the charges for which he is currently confined, with full knowledge of the nature and consequences of such pleas, while represented by competent counsel, and is advised of his right to appeal, but neither seeks to withdraw his pleas of guilty, nor seeks to perfect an appeal to this Court, and where said defendant thereafter fully and voluntarily acknowledges his guilt before the Pardon and Parole Board and is granted parole which

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is later revoked, he is not entitled to discharge from the penitentiary by way of habeas corpus.

Original Proceeding in which Frank Naceo Martin seeks his release from confinement by writ of habeas corpus. Writ Denied.

Hamilton & Carson, Oklahoma City, for petitioner.

G. T. Blankenship, Atty. Gen., Hugh H. Collum, Asst. Atty. Gen., for respondent.

BUSSEY, Judge:

This is an original proceeding in which Frank Naceo Martin, hereinafter referred to as defendant, was charged in the District Court of Oklahoma County for Robbery with Firearms and Rape in the First Degree. After having entered pleas of guilty, he was sentenced to serve three life sentences in the State Penitentiary at McAlester—one for robbery with Firearms and two for Rape in the First Degree, all to run concurrently. The judgments and sentences were entered against the defendant on the 6th day of February, 1952, and no appeal was perfected to this Court. Thereafter, the defendant was received by the penitentiary officials on the 12th day of February, 1952, and was paroled on the 29th day of November, 1961, which parole was revoked on the 6th day of October, 1966, and said defendant was returned to the penitentiary. Thereafter he filed an application in the District Court of Pittsburg County seeking his release from confinement under the sentences rendered against him in the District Court of Oklahoma County and said application was by the court denied on the 18th day of December, 1967, in accordance with Hurt v. Lackey, Okl. Cr., 372 P. 2d 50.

At the outset we observe that defendant does not seek post conviction review of the judgments and sentences rendered against him, but rather attacks the validity of said judgments and sentences alleging the following: that he was taken into custody by the City Police, beaten, and thereafter confessions were obtained from him by the city authorities and the authorities of Oklahoma County. Defendant further alleges that he was advised by unnamed officers that if he entered pleas of guilty to all of the charges he would receive a sentence of ten years imprisonment. Defendant alleges that he was arraigned in the Justice of the Peace Court and Preliminary Hearing was set thereon, at which time he was not advised of his right to counsel and at which time he, at the suggestion of the prosecuting authorities, waived preliminary hearing. He further alleges that the Public Defender was appointed to plead him guilty and that the said Public Defender did not converse with him about the facts in the case, but he assumed the Public Defender knew of the agreement to enter the pleas of guilty in exchange for a ten year sentence in each of the charges, to run concurrently.

Defendant further alleges that he appeared in the District Court of Judge Glen O. Morris where he entered pleas of guilty to the charges above named, together with other charges, which were to run concurrently and have been fully satisfied.

Defendant alleges that he was not advised of his right to appeal and was ignorant of the law concerning his right to appeal and for this reason no appeal was perfected.

This matter was set for oral argument on the 16th day of January, 1968, at which time the defendant and his attorneys appeared in open court, the

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defendant was sworn and testified in substance that on the evening of his arrest at about 1:00 in the morning, while a prisoner in the city jail of Oklahoma City, two officers of the Oklahoma City Police Department came to his cell and beat him and that thereafter, during the day following his arrest, he was advised by the interrogating officers that if he would confess to the several crimes of which he was suspected and enter pleas of guilty, he would receive total sentences of ten years. Defendant further testified that he conversed only one time with his court-appointed counsel prior to appearing in the District Court and did not discuss the merits of the cases at that time. He further testified that he went to the District Court of Judge Morris with the intention of pleading guilty under the promise of receiving the ten year sentences, but that he personally did not enter a plea of guilty or could not remember so doing, and he was sentenced as set forth above. Defendant further admitted that when he appeared before the Pardon and Parole Board he acknowledged his guilt to the several offenses for which he was convicted, but stated he would have done anything to get out of the penitentiary. The defendant attached a number of exhibits to his petition and the State, in its Response and Memorandum Brief, has answered the various allegations of the defendant.

At the outset, we observe defendant's first contention that he was beaten by city police officers is supported by his testimony and indeed by a newspaper account which he attaches as Exhibit D[2]. This exhibit upon which he relies to support his allegation of a beating, however, reflects that the confessions were obtained prior to the beating and further reflects that the officer who abused the defendant was not seeking a confession, but that he beat the defend-

ant because one of the victims of the rape was a friend of the officer's. When this matter was called to the attention of the city police officials by the defendant, one of the officers was fired and the other resigned. Although the defendant alleges that he was promised ten year sentences in exchange for his pleas of guilty, he could not recall who the officers were.

The record does disclose that he waived preliminary hearing, appeared in open court and was appointed Mr. Charles W. Moos to represent him when he requested the appointment of counsel. This appointment was made by the Honorable Baker Malone, one of the Judges of the Seventh Judicial District, on the 25th day of January, 1952. The record further reflects in the judgments and sentences duly signed by the trial judge, that the defendant appeared in open court and with counsel and was advised of his constitutional rights, whereupon he entered his pleas of guilty and was by the court sentenced to the respective three life imprisonment terms and other sentences to run concurrently with them, which have been fully satisfied. The record reflects that the trial judge advised him of his right to appeal, but that after the rendition of judgment he neither sought to withdraw his pleas of guilty, nor requested a transcript at public expense, nor the appointment of counsel to represent him on appeal.

Under these facts we are of the opinion that when the defendant appeared in open court with counsel, freely and voluntarily entered pleas of guilty with full knowledge of the nature and consequences of such pleas, he effectively waived any irregularity in the preliminary proceedings. It is significant to note that although the defendant remained in the penitentiary from 1952 until his release on proba-

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tion in 1961, he did not seek to question his convictions, but rather the records of the penitentiary reflect that he acknowledged his guilt as indeed he did, when he appeared before the Pardon and Parole Board prior to receiving his parole. It is likewise significant that subsequent to the revocation of his parole he has never sought a post conviction review of the judgments and sentences rendered against him, but has instituted these proceedings when the trial judge and the court-appointed attorney are both deceased. He seeks to bolster his allegations by his testimony alone.

We are of the opinion that the relief prayed for should be denied for the reason that he has failed to establish proof of his contentions, and for the further reason that the defendant knowingly and intelligently entered pleas of guilty to the charges for which he is currently confined, with full knowledge of the nature and consequences of such pleas, while represented by competent counsel, and that he has not been denied any right under the Constitution of the United States or the State of Oklahoma.

For all of the reasons above set forth, the writ of habeas corpus is hereby denied.

Writ denied.

NIX, P. J., and BRETT, J., concur.